

OREGON REAL ESTATE AND LAND USE DIGEST

*Published by the Section on
Real Estate and Land Use,
Oregon State Bar*

Vol. 35, No. 1
February/March 2013

Also available online

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PLPR 7th Conference—Convergence of the International Community of Academics, Planners, and Lawyers

The International Academic Association on Planning, Law, and Property Rights ("PLPR") held its 7th Conference in Portland, Oregon, at Portland State University, February 13-15, 2013. Each year PLPR holds an annual conference at different venues throughout the world. Last year the conference was held in Belfast, Northern Ireland. Portland was chosen as the conference site this year to celebrate the 40th anniversary of the passage of Senate Bill 100, the landmark legislation that established the statewide comprehensive land use planning program.

The conference attracted numerous prominent international and local land use and real estate leaders in academia, planning, and law. It was attended by around 120 participants, about 60 percent of whom were from outside the US. The three-day conference featured more than 20 sessions addressing "Property Rights and a Changing Economy," reflecting the challenges of globalization and the enduring economic downturn on communities and professional practice. Keynote speeches were given on "Getting Past 'Yes or No'—Linking Police Power Decision-making with Just Compensation," by Dwight Merriam, Founder of Robinson & Cole's Land Use Group; and on "Optional Planning," by Lee Fennell, Professor at the University of Chicago Law School.

PLPR dedicated an entire day of sessions to Oregon's internationally-renowned land use planning program. Distinguished panels discussed the introduction and passage of Senate Bill 100, the role of citizen involvement, and Goals 1, 5, and 11. The panelists critiqued implementation of some goals and offered a vision for the next 40 years of planning in Oregon.

The panelists frequently referred to a recently published book, *Oregon Plans: The Making of an Unquiet Land Use Revolution*, by Sy Adler, Professor at the Toulon School of Urban Studies and Planning at Portland State University. In *Oregon Plans*, Adler provides a detailed analysis of the origins and evolution of Oregon's land use planning program, including a dissection of its political history.

Among the noteworthy panelists discussing Oregon's land use program was Arnold Cogan of Cogan Owens Cogan LLC, the first Director of the Oregon Department of Land Conservation & Development. Cogan made a presentation on how the program originated and lessons learned after 40 years.

Steven R. Schell of Black Helterline LLP, former Vice-Chair of the Oregon Land Conservation and Development Commission, presented *NIMBYs, Stakeholders, and Legitimate Expectations—Land Use and Change in Oregon*. Schell provided his insights on the early days of land use planning in Oregon and thoughts on the adequacy of the planning program framework. In looking to the future, he argued that "we need to cut through the inertia of NIMBYs, stakeholders with vested interests,

and the extremism of some ‘legitimate’ expectations to provide responsive institutional frameworks that meet the current needs of our society.”

Edward Sullivan of Garvey Schubert Barer, Adjunct Professor at Northwestern School of Law at Lewis and Clark College and Portland State University, discussed *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*. Sullivan examined the history of the Oregon planning program and the influences on its development. He also evaluated the program in the light of its objectives. Sullivan noted that many other states require comprehensive planning but do not require that land use decisions comply with comprehensive planning documents, which Sullivan characterized as “disgraceful.”

John R. Gustafson, former director of the U.S. Environmental Protection Agency (“EPA”), spoke about the initial implementation of the Land Conservation & Development Commission (“LCDC”) and the aftermath of the passage of Senate Bill 100, the impact of Senate Bill 100 on EPA’s growth management policies, and the fundamental role of public participation in the LCDC goal development process.

John A. Charles, Jr. of the Cascade Policy Institute offered a somewhat provocative critique of transit-oriented development (“TOD”) as a growth management tool in Portland and the land use controls around TODs. He compared general planning visions for TODs and the “reality” of TODs as built, based on about 10 years of data collected by his organization. He argued that, contrary to conventional wisdom, “sprawl is cheap” and “density costs money.”

Anyeley Hallova of Project Ecological Development examined the effectiveness and challenges of implementation of Statewide Planning Goal 1, Citizen Involvement, through a case study of Harrison Apartments. This is a controversial proposed multi-family development in Corvallis, Oregon that is located in a High-Density Residential Zone with a Planned Development overlay. In her view, the city’s citizen involvement program, as applied to the case study site, caused unnecessary delays and limitations on the proposed development. She argued that Goal 1 should be used as a tool and should not be placed above all other goals in the program.

Benjamin H. Clark, J.D., of the University of Oregon was joined by co-author Edward Sullivan to present their paper *A ‘Timely, Orderly, and Efficient Arrangement’ of Public Facilities and Services: The Oregon Approach*. The article addressed the enduring public facility and service issues of coordinated planning, financing, timing, urbanization, and maintenance. The article details the manner by which Oregon addresses these common problems.

Paul Hribernick of Black Helterline LLP discussed the land use approval process for mineral and aggregate development under Statewide Planning Goal 5 and argued for a better balancing of citizen participation and appeal rights with predictable economic outcomes for development of such resources.

Courtney Johnson of the Crag Law Center spoke about the impacts of rising sea levels on portions of the Oregon coastline protected under the Oregon Coastal Goals and the Oregon Beach Bill. She fielded questions from international attendees concerned with similar impacts on coastlines around the world.

Many thanks to Edward Sullivan and Ellen Bassett, who chaired the PLPR Local Host Committee, and to Al Burns, Sy Adler, and many others who helped organize and contribute to the success of the conference.

Tiffany Johnson

Ms. Johnson is an intern with the Oregon Land Use Board of Appeals

■ COURT OF APPEALS INTERPRETS MEANING OF “LAWFULLY WAS PERMITTED TO ESTABLISH” UNDER MEASURE 49 “EXPRESS PATHWAY”

In *Ericsson v. State ex rel. Department of Land Conservation and Development*, 251 Or. App. 610, 285 P.3d 722 (2012), the Court of Appeals examined the meaning of the phrase “lawfully was permitted to establish” in section 6(6)(f) of Measure 49. That section provides that, to qualify for a homesite approval under the “express pathway” (up to three homesite approvals), the claimant must establish that “[o]n the claimant’s acquisition date, the claimant *lawfully was permitted to establish* at least the number of lots, parcels or dwellings on the property that are authorized [by Measure 49]” (emphasis added).

Petitioners appealed a judgment affirming an order of the Department of Land Conservation and Development (“DLCD”) that denied relief to petitioners under Measure 49. Petitioners had obtained waivers from DLCD under Measure 37 (2004) in order to facilitate development of two adjacent lots in rural Washington County, but DLCD denied petitioners’ application for homesite approvals for both lots under Measure 49 (2007), concluding that neither lot met the section 6(6)(f) standard requiring that the claimant “lawfully was permitted to establish” the requested homesites on the acquisition date.

At issue in the case was the nature of proof required to establish that the claimant “lawfully was permitted to establish” the homesites under section 6(6)(f). Petitioners construed “lawfully was permitted” to mean “potentially allowed by law.” Petitioners argued that they were entitled to homesite approvals as a matter of law because the applicable zoning code did not prohibit the use and, if certain approvals had been obtained (e.g., partition and/or zone change), the requested homesites would have been possible. DLCD responded that petitioners were required to present sufficient evidence to demonstrate that the homesite uses *would have* been allowed at the time the property was acquired. According to DLCD, it was insufficient to show what *might* have been developed under the applicable zoning code.

Oregon Real Estate and Land Use Digest

Oregon Real Estate and Land Use Digest is published approximately six times a year by the Section on Real Estate and Land Use, Oregon State Bar, 16037 SW Upper Boones Ferry Rd, PO Box 231935, Tigard, OR 97281-1935.

Subscription Price: free to Real Estate and Land Use Section Members, \$25.00 per year for others.

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The purpose of this publication is to provide information on current developments in the law. Unless stated otherwise, opinions expressed in any article are solely those of the author and are not necessarily endorsed by the Executive Committee of the Real Estate and Land Use Section or the Oregon State Bar. The editors welcome letters or articles for publication.

Relying on text and context, the court generally agreed with DLCD. The court concluded that, in order to provide that a claimant “lawfully was permitted to establish” dwellings or lots, a Measure 49 claimant must provide by evidence in the administrative record that it is “more likely than not that the claimant would have been actually permitted to establish the use, based on the application of prior law . . . in effect at the time of acquisition.” 251 Or. App. at 625. In other words, section 6(6)(f) requires proof that a particular development proposal and condition of the property would comply with the acquisition zoning. Because petitioners made no showing that the homesites would have been allowed at the time the property was acquired, the court affirmed the trial court’s decision.

Sarah Stauffer Curtiss

[*Ericsson v. State ex rel. Dept. of Land Conservation and Dev.*](#), 251 Or. App. 610, 285 P.3d 722 (2012)

■ HONEST BELIEF NOT REQUIRED FOR EXTINGUISHMENT OF EASEMENTS BY ADVERSE POSSESSION

Everyone knows the elements of a common-law adverse possession claim, right? Say it with me: actual, open, notorious, exclusive, hostile, and continuous possession for the statute of limitations period. The Oregon legislature enacted ORS 105.620 in 1989, codifying the common law and additionally requiring good faith for all claims vesting after January 1, 1990. Thus, under ORS 105.620(1)(b), a party claiming adverse possession (or their predecessors in interest) must have honestly believed that they owned the disputed property at the time they first entered into possession of it.

In the recent case of *Uhl v. Krupsky*, 254 Or. App. 736, ___ P.3d ___ (2013), the Court of Appeals of Oregon found that the good faith requirement does not apply when one seeks to extinguish an easement over property owned in fee simple. That is, a party attempting to quiet title and establish unencumbered ownership of the totality of their property is not required to have believed that an easement did not exist when they took action to dispossess the dominant landholder from its use.

Plaintiffs in *Uhl* sought to quiet title to their property, which they had purchased in 1995. At that time, a 60-foot-wide driveway and utility easement encumbered the property. Plaintiffs wanted the court to declare the easement extinguished by adverse possession.

The easement, appurtenant to an adjoining landlocked parcel, provided the dominant parcel with a route of access and ample space for utility lines across plaintiffs’ property. Defendants purchased the adjoining parcel in 1999. When they acquired their respective parcels, both parties were aware of the easement. It had been created and recorded when the former common owner of the properties partitioned them into two lots. Prior to either party’s acquisition of title, a fence was constructed along the length of defendants’ driveway, effectively excluding defendants from two-thirds of the easement.

When the parties could not agree on defendants’ right to use the blocked portion of the easement, plaintiffs filed an action to quiet title and declare defendants’ easement rights extinguished. Judge Grant of Columbia County Circuit Court found for plaintiffs. Defendants appealed, arguing, as they did below, that ORS 105.620 applies to all adverse possession claims vesting after January 1, 1990, including those seeking to extinguish easement rights. The appellate court affirmed, finding that the plain language of the statute and logical analysis supported plaintiffs’ position.

The court emphasized the terms “acquire” and “fee simple title” found in the first sentence of ORS 105.620: “[a] person may acquire fee simple title to real property by adverse possession only if” The court then analyzed these terms in the context of possessory estates, looking to § 9 of the Restatement (First) of Property, where it is stated that “easements . . . are not interests which may become possessory.” The court found, then, that these key terms “limit the statute’s reach to adverse possession claims involving the acquisition of possession, control, and the power of disposal of the broadest property interest allowed by law, which does not include an easement.” *Uhl*, 254 Or. App. at 741. Because plaintiffs already owned the property in fee simple,

and because they were not asking the court to grant an easement by adverse possession (prescriptive easement) but sought only to quiet title by extinguishment of an easement, the action did not have the effect of altering the status of fee simple ownership contemplated by ORS 105.620. Moreover, logical analysis of the statutory language establishing the honest belief requirement lends support to the finding that it does not apply to extinguishing easements. That language speaks of “the person entering into possession” and “the actual owner of the property.” In this case and most other easement-extinguishing cases the plaintiff already possesses and is the actual owner of the property. (The court distinguished rather than overturned its opinion in *Stiles v. Godsey*, 233 Or. App 119, 225 P.3d 81 (2009), by noting that plaintiff in that case sought to acquire fee simple title *and* extinguish an easement concurrently, and the court did not separately address the applicability of ORS 105.620 to the extinguishment claim but arguably should have.) In the end, the court stated affirmatively that ORS 105.620 “does not apply to adverse possession claims whereby the owner of fee simple title to real property seeks to extinguish an easement on that property” *Id.* at 745.

This case is important to owners of dominant and servient properties alike. Easement holders should be wary of obstacles placed in the path of their full use of the easement. They should act to enforce their easement rights before the statutory period lapses as they will not be able to rely on arguing bad faith in the placement of such obstacles. Owners of land servient to easement holders may now rely on this decision in seeking to extinguish easements and need not be concerned that their knowledge of the existence of the easement will be counted against them—it won’t.

Nick Merrill

[Uhl v. Krupsky](#), 254 Or. App. 736, ___ P.3d ___ (2013)

Appellate Cases – U.S. Supreme Court

■ *THE US SUPREME COURT WRESTLES IN THE SWAMP OF OFF-SITE IMPROVEMENT OBLIGATIONS AND TAKINGS*

In 2010, the 9th Circuit ruled in a case involving the City of West Linn that conditions to development approval requiring off-site improvements, such as the installation of a pipeline or road improvement, were not subject to the same “rough proportionality” obligations imposed for when the government requires acquisition of land. *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (2011). The Oregon Supreme Court, responding to a series of questions asked by the 9th Circuit as part of its deliberations, concluded that where a regulation requires that the owner pay a sum of money, “the regulation is not tantamount to acquisition” *West Linn Corporate Park, LLC v. City of West Linn*, 349 Or. 58, 93, 240 P.3d 29 (2010). The U.S. Supreme Court declined further review, 132 S. Ct. 578, 181 L. Ed. 2d 441 (2011), and the West Linn case settled this matter until now.

On January 15th of this year, however, the U.S. Supreme Court heard oral argument in *Koontz v. St. Johns River Management District*, 133 S. Ct. 420, 184 L. Ed. 2d 251 (2012), requiring the Court to grapple with the right of government to impose off-site conditions in return for permit approval. Coy Koontz, Sr. wanted to develop 3.7 acres of wetlands and protected uplands located in a habitat protection zone controlled by the local St. Johns River Water Management District in Florida. Koontz applied for a permit and offered to place his remaining 11 acres of property into a conservation easement. The District responded that additional off-site wetlands mitigation was necessary to offset the loss of wetlands. The District asserted Koontz would likely be required to pay for improvements for these off-site wetlands but said it was open to other alternatives. Koontz rejected the District’s specific proposal and his permit was denied.

Koontz filed suit in Florida state court arguing that there was no “essential nexus” or “rough proportionality” between the government request for off-site improvements and the impacts from the proposed development. The state trial court ruled in favor of Koontz, finding a taking, but the Florida Supreme Court reversed, finding

that there was no “dedication of real property” and therefore, no taking occurred. 77 So. 3d 1220, 1230 (2011). In October, 2012, the U.S. Supreme Court accepted the case.

As with the plaintiff in the *West Linn* case, Koontz argued that the off-site mitigation measures suggested by the district in order to allow the development on his property to go forward were not “roughly proportional” to the impacts from this development and, further, these tests apply to conditions suggested by the government in a permit negotiation process but never actually imposed. The District and a number of *amici* argued that Koontz’s claim was inconsistent with the text and history of the Takings Clause, as well as the Court’s takings jurisprudence, and that no taking could have occurred because no property was actually taken. The brief filed by the amicus American Planning Association argued that “a ruling for Koontz would effectively constitutionalize all run-of-the- mill land use negotiations and risk grinding both the land use process and the judicial system itself to a halt.”

This will be one of the first takings cases considered by Chief Justice Roberts. Although one should never read too much into the questions or comments raised at oral argument, they may be telling. One of the most conservative members of the court, Justice Scalia stated that he did not see how a taking had occurred in this case. Digging further into the facts of the case, Justice Ginsburg noted, the district had given Koontz a list of possible options and was willing to continue the discussion. “The record is very clear. The district didn’t come back and say take it or leave it,” she said. Justice Samuel Alito suggested that he may favor Koontz stating: “There’s a danger of the balance tilting too far in favor of government agencies, to the extent that the law limiting the ability of government to impose conditions would only be ‘a trap for really stupid districts.’” Justice Sotomayor found the opposite result from ruling in favor of Koontz: “I see an enormous flood gate here, and one in which we are sending a signal that perhaps states should be more quiet rather than more engaging. They should say no, because anything they offer is going to be seen . . . potentially as an unconstitutional taking.”

It could be that the Supreme Court may not have to reach the limits of the unconstitutional conditions question as the 9th Circuit did in *West Linn*, finding instead that the government did not impose any conditions as a result of permit denial. However, the Court could go further, finding that since no property was taken, no physical exaction occurred. Mr. Koontz was left with the same “economically viable” wetlands property he had before he sought the permit.

Edward J. Sullivan and Carrie A. Richter

Koontz v. St. Johns River Mgmt. Dist., 133 S. Ct. 420, 184 L. Ed. 2d 251 (2012)

Appellate Cases – Ninth Circuit

■ *NINTH CIRCUIT DECIDES ANOTHER CONTROVERSIAL FIRST AMENDMENT BILLBOARD CASE*

Charles v. City of Los Angeles, 697 F.3d 1146 (9th Cir. 2012), involved defendant city’s requirement for a building permit for any temporary sign that did not contain a political, ideological, or other non-commercial message. Plaintiffs sought to place an offsite sign on the wall of a storage building advertising, among other things, “E! News,” but city officials found it to be commercial and thus in violation of its code. The Federal District Court agreed with the city’s position, which had the effect of regulating commercial signs far more extensively than non-commercial ones. Plaintiffs claimed their signs were non-commercial, as their display content related to movies, theaters, TV, radio shows, music, books, newspapers, and “other works of art.”

Plaintiffs wrote city officials about the lawfulness of the sign and the city officials replied that the sign violated the regulations and that plaintiff should cease and desist installation or the city would enforce the code. Plaintiffs then brought this declaratory judgment action, alleging First Amendment and Equal Protection violations, and sought a temporary restraining order and a preliminary injunction. The court denied the temporary restraining order and preliminary injunction.

The city moved to dismiss the complaint on standing, ripeness, and merits grounds. The trial court found that the litigation over the existing display could proceed but that the content of the signs was commercial in nature. The court dismissed the complaint.

On appeal, the Ninth Circuit characterized the question as whether truthful advertising was inherently non-commercial and thus subject to a higher level of protection under the First Amendment. Under *Bolger v. Youngs Drug Products Corporation*, 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983), an economic motivation for a message was “strong support” that it could be characterized as commercial, as it proposed a commercial transaction.

Plaintiffs conceded that the E! News display was an advertisement but asserted that the advertisement involved “the ideas, expression, and content contained in the works” and is therefore entitled to First Amendment protection. The court said that if commercial and non-commercial speech were inextricably intertwined, a court would treat the speech as protected under the First Amendment as if it were non-commercial expression. However, the display at issue was limited to the show’s logo, description, and photos of its hosts, inviting the public to view them. As such, it was not identical to the speech that constituted the program itself.

The court distinguished cases involving religious advertisements such as in pamphlets asking for contributions in addition to advancing religious doctrine. In that context the pamphlet would not be commercial in nature. This is so even if the pamphlet invites purchase of a religious book or tract. Also, the court distinguished California cases providing tort law immunity for certain publicity (favorable or unfavorable) about a book or a movie for example, refusing to extend that protection to billboard law. Thus, while publicity for a controversial book or film may be protected under the First Amendment, using those same images as part of a commercial billboard enterprise is not protected against otherwise constitutional land use regulations.

The court observed:

The principle unifying the exceptions to the commercial speech doctrine for advertisements for protected works is the need to protect advertisers from tort actions that would otherwise threaten the ability of publishers to truthfully promote particular works. While lower courts have occasionally used imprecise, overbroad language in describing these exceptions, it is only in the narrow context of this principle that we have recognized that the noncommercial First Amendment status of an underlying expressive work extends to advertisements for that work. Appellants now seek to extrapolate from these limited exceptions a categorical rule: truthful advertisements for noncommercial speech always share the identical level of First Amendment Protection as the underlying speech. That the law extends special protection to advertisements for First Amendment-protected works in the context of certain tort actions, however, does not support a sweeping rule that advertisements for protected speech are “noncommercial” in all contexts.

697 F.3d 1146, 1155 (footnote omitted).

The court found that application of the sign ordinance to ads for expressive works had not been shown to threaten the ability of speakers to publicize or criticize otherwise protected speech and there was no need to extend that protection to billboards and advertising, whether it advertised E! News or other expressive activities. The limited protection of the First Amendment commercial speech doctrine has no application in this circumstance.

This case deals with the sometimes difficult question as to the line between commercial and non-commercial speech. It also relates to the question of whether the First Amendment immunity to publicity or criticism of works extends to commercial ads for those works. This case says it does not.

Edward J. Sullivan

Charles v. City of Los Angeles, 697 F.3d 1146 (9th Cir. 2012)

■ ACCEPTANCE OF “NON-EMPTY” CONTAINERS CAN SUBJECT PLASTICS RECYCLERS TO REGULATION AS TSD FACILITIES FOR DANGEROUS WASTE

In *K.P. McNamara Northwest, Inc. v. State, Washington Department of Ecology*, 292 P.3d 812 (Wash. App. 2013), Division 2 of the Washington Court of Appeals affirmed a decision by the Pollution Control Hearing Board (“the Board”) against appellants KP McNamara and its owner, Kerry McNamara. The case involved procedural challenges to the Board’s grant of summary judgment on issues relating to penalties the Department of Ecology (“DOE”) had issued to KP McNamara and Kerry McNamara for violations of the Hazardous Waste Management Act (“the HWMA”) concerning mishandling of rinse water designated as dangerous waste.

KP McNamara operated a facility in Vancouver, Washington that processed 300-gallon plastic containers (called “totes”) used at other manufacturing and service facilities for storing substances designated as “dangerous waste” by Washington State Dangerous Waste Regulations, chapter 173–303 of the Washington Administrative Code (“WAC”). KP McNamara drained, rinsed, and then either refurbished or deconstructed the containers.

In August 2007, an inspector for DOE first became aware of possible violations at the KP McNamara facility. Testing of rinse water samples from the facility floor revealed concentrations of corrosive wastes. Inspections also revealed that some containers at the facility were not “empty” under WAC 173-303-160(2). Under the HWMA, any facility that treats, stores, or disposes of dangerous waste (“a TSD Facility”) must have a permit issued by the state of Washington. Facilities using containers not defined as “empty” under WAC 173-303-160(2) are also subject to dangerous waste regulations and must have the proper permit.

The DOE inspector issued immediate action letters urging compliance. The inspector and KP McNamara eventually agreed that KP McNamara would use “process knowledge” to designate all of its rinse water as dangerous waste. The alternative to the process knowledge method would be to “batch test” each batch of rinse water.

Inspections in May 2008 revealed that KP McNamara had sent four shipments of waste water to Pacific Power Vac in Portland, Oregon in violation of WAC 173–303–141(2). KP McNamara (1) failed to use a certified dangerous-waste transporter to haul the waste, (2) failed to complete a uniform hazardous waste manifest for the shipment, and (3) did not have required documentation showing that Pacific Power Vac was authorized to accept the waste. Even after being ordered to cease off-site shipments, KP McNamara sent another shipment of rinse water to Pacific Power Vac.

In October 2008, inspections revealed that “nearly 100 totes of dangerous waste wash water had accumulated on-site as well as several totes that did not meet the regulatory definition of empty.” 292 P.3d at 827. In response, DOE issued penalties to KP McNamara and Kerry McNamara for violations of the HWMA under WAC 173–303–141(2) (failure to use appropriate procedures and methods when sending a state-only designated dangerous waste to an out-of-state facility) and WAC 173–303–280 and –400 (failure to obtain a permit or to comply with the requirements for operating a TSD facility). KP McNamara and Kerry McNamara timely appealed to the Board. A prehearing conference established seven issues to be decided by the Board, four of which the court of appeals found relevant in the appeal.

The first issue was whether Kerry McNamara could be held personally liable for the actions of KP McNamara under the responsible corporate officer doctrine, which allows liability to be premised on a corporate officer’s failure to prevent or correct a violation of a statute when that officer has the power to do so. Kerry McNamara argued that a specific finding regarding “the interaction of [his] authority and the statute” was required. The Board determined that as CEO of KP McNamara, Kerry McNamara “exercised significant control over KP McNamara’s operations and ‘was clearly aware of and engaged in [responding to] the compliance problems at the Vancouver facility.” *Id.* at 832. The court of appeals held that the responsible corporate officer doctrine

requires no further determination to impose personal liability, and thus affirmed the Board's decision to impose personal liability in this case. *Id.* at 833.

The next issue was whether KP McNamara had inappropriately disposed of dangerous wastes when it shipped rinse water to Pacific Power Vac. Appellants relied upon their interpretation of *Hickle v. Whitney Farms, Inc.*, 148 Wash. 2d 911, 64 P.3d 1244 (2003), which they claimed had established that what matters is whether a material meets any criteria of a dangerous waste, not that it had been merely "designated" as such. They argued that the designation of the rinse water as dangerous waste through process knowledge was not dispositive on whether the rinse water was actually dangerous waste, and that the Department of Ecology failed to prove the transported water was dangerous waste. The court found appellants' argument relied upon a mischaracterization of *Hickle*, and that the earlier case had in fact clearly stated that it was the *waste generator's* duty to determine whether the particular waste was regulated under the HWMA. KP McNamara had the option of choosing process knowledge or batch testing to make that determination, and for reasons of convenience had determined all of the rinse water to be dangerous. The court held that once a determination has been made that a substance is dangerous waste, the burden lies with the waste generator to produce evidence proving otherwise. KP McNamara's failure to produce any evidence refuting that designation made the Board's summary judgment of the issue valid, and the court affirmed.

Finally, the court addressed whether, as a matter of law, KP McNamara violated the dangerous waste regulations by receiving non-empty containers when it did not have a TSD facility permit. In dispute was whether KP McNamara was protected by manifest discrepancies regulations, which allow a facility owner to decline to accept a dangerous waste shipment if the facility is incapable of properly managing the waste in the shipment. Former WAC 173-303-370(5)(b). KP McNamara contended that this provision implied that "taking temporary custody of the waste did not require a permit," and thus protected it from the Department's penalty for its receipt of the non-empty containers. As basis for their appeal, appellants argued the Board improperly considered evidence of KP McNamara's management of non-empty containers when the issue should have been narrowly focused on whether they were allowed to receive them in the first place.

The court affirmed the Board's summary judgment, holding that the manifest discrepancy rules did not shield KP McNamara from a penalty. KP McNamara failed to demonstrate that the way it received the non-empty containers complied with the manifest discrepancy regulations. Furthermore, the court held that even if there had been a procedural error in deciding this issue, it did not prejudice the appellants. Any evidence considered here would have been properly before the Board when it decided the separate and greater issue of whether violations had actually occurred. The parties had been given sufficient notice that these facts would be before the board. Finding no error in the Board's decision, the appellate court reversed the trial court's decision and affirmed the Board's decision in full.

Michael Koes

K.P. McNamara Northwest, Inc. v. State, Washington Dept. of Ecology, 292 P.3d 812 (Wash. App. 2013)

■ **THE ELEPHANT IN THE SEATTLE COURTROOM**

Typically, Washington taxpayers have standing to sue municipalities for illegal governmental conduct based on the presumption that all taxpayers are harmed by such acts. In *Sebek v. City of Seattle*, ___ Wash. App. ___, 290 P.3d 159 (2012), Division One of the Washington Court of Appeals faced the question of whether allegations of city financial support of activities that resulted in animal cruelty sufficiently established taxpayer standing. The court answered no.

This case arises from observations that the elephants under the custody of the Woodland Park Zoological Society ("the Zoo Society") suffered from severe physical and emotional distress resulting from inadequate housing conditions. Plaintiffs Mary Sebek and Nancy Farnam sued the City of Seattle, alleging the city's financial support of the Zoo Society's activities constituted illegal government expenditures. Specifically,

plaintiffs alleged that the city's payments supported the Zoo Society's injurious housing of elephants in violation of state and local animal cruelty laws (Revised Code of Washington 16.52.207 & Seattle Municipal Code § 9.25.081).

A significant hurdle for the plaintiffs in this case was the allocation of responsibilities for animal care and maintenance. In 2002, the city and the Zoo Society had entered into a long-term contract securing the city's responsibility to *fund* the Zoo Society's general operations in return for the Zoo Society's commitment to *exclusively* operate and manage the zoo. Plaintiffs' original complaint referenced the zoo's, not the City's, responsibility for the alleged violations. Based on the Zoo Society's exclusive control over the elephant exhibit, the trial court held plaintiffs' complaint did not implicate any illegal city conduct; rather, the complaint only alleged the Zoo Society acted illegally. The trial court dismissed plaintiffs' taxpayer action against the city for lack of standing.

On appeal, Division One of the Washington Court of Appeals affirmed. Like the trial court, the court of appeals focused on the express contract terms designating the Zoo Society's exclusive control over zoo operations. Plaintiffs argued that *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wash.2d 610, 694 P.2d 27 (1985), provided the basis to hold the city liable for the illegal acts of a third party contracted to provide government services.

In *Boyles*, a taxpayer sued to enjoin the county from placing prisoners in a social re-entry program which mandated religious activities. The Washington Supreme Court held taxpayers have sufficient standing when challenging government acts favoring one religion over another. However, the court of appeals effectively distinguished the county's acts in *Boyles* from the city's acts in *Sebek*; the alleged governmental act in *Sebek* was that of funding the zoo, and not the animal cruelty violations themselves. While the elephant's housing conditions constituted the impetus for plaintiffs' action, it was legality of the city's funding that was at issue.

Ultimately, the court of appeals' decision hinged on whether the city could be held vicariously liable for the Zoo Society's alleged violations of animal protection laws. Plaintiffs argued the city was vicariously liable because the city's funding, in conjunction with their knowledge of the zoo's violations, enabled the Zoo Society to violate animal cruelty laws. Relying on the express terms of the contract, the court found the city could not be held vicariously liable because the Zoo Society maintained exclusive control over the elephant exhibit. Because plaintiffs failed to allege any city acts violating any statute or ordinance, the city's contractual requirement to financially support the Zoo Society's operations was insufficient to establish vicarious liability.

Jamie S. Dughi

Sebek v. City of Seattle, ___ Wash. App. ___, 290 P.3d 159 (2012)

LUBA Summaries

■ LUBA PROCEDURE – ISSUE PRECLUSION

LUBA's decision in *Hatley v. Umatilla County*, ___ Or. LUBA ___, LUBA Nos. 2012-017/-018/-030 (Oct. 4, 2012), reaffirms LUBA's analysis of when parties are precluded from raising issues at LUBA that were or could have been litigated in a previous appeal involving the same land use decision. It is a noteworthy decision for practitioners seeking a refresher on the application of issue preclusion principles as LUBA and the Oregon Supreme Court have articulated them in *Beck v. City of Tillamook*, 313 Or. 148, 831 P.2d 678 (1991), and subsequent cases.

The decisions appealed in *Hatley* are the county's second effort to amend its land use regulations for wind energy facilities. The county's first efforts in 2011 were appealed to and remanded by LUBA in *Cosner v. Umatilla County*, ___ Or. LUBA ___, LUBA Nos. 2011-070/071/072 (Jan. 12, 2012) (summarized in the March 2011 issue of the *Digest*), on the grounds that: (1) the ordinances impermissibly delegated the county's

legislative authority because they allowed landowners affected by a wind energy facility to authorize a setback smaller than the two-mile setback established in the ordinances; (2) one of the ordinances amended the county's Goal 5 program and the county failed to comply with the Goal 5 rule in adopting these amendments; and (3) the county failed to adopt adequate findings of compliance with county comprehensive plan policies concerning energy.

On remand, the county adopted two ordinances in 2012 that amended the ordinances appealed in *Cosner*. The first ordinance deleted the constitutionally problematic setback waiver provisions. The second ordinance deleted text that established additional protections for inventoried Goal 5 resources, rendering Goal 5 inapplicable. The county also adopted an order containing findings that explained why the 2012 ordinances are consistent with county comprehensive plan policies that encourage the development of alternative energy resources. The petitioner in *Hatley*, also a named petitioner in *Cosner*, appealed all three county decisions to LUBA.

Citing the *Beck* decision, the county argued LUBA was precluded from addressing six of the petitioner's issues because they were or could have been raised in the *Cosner* appeal. The petitioner argued the *Beck* decision had a limited effect and only barred a party from relitigating issues in a subsequent appeal that were actually raised and decided in the first appeal of a decision that LUBA remanded. LUBA agreed with the county, stating that it has consistently understood *Beck* to preclude a party from litigating in a second appeal issues that were actually raised in a first appeal *and* issues that could have been raised in the first appeal, but were not. Additionally, citing the Court of Appeals' decision in *Mill Creek Glen Protection Association v. Umatilla County*, 88 Or. App. 522, 527, 746 P.2d 728 (1987), LUBA explained that the doctrine of issue preclusion has been extended to bar a person who could have but did not participate in the first appeal from raising issues in a subsequent appeal that could have been raised in the first appeal. Finally, LUBA disagreed with the petitioner's assertion that *Beck* applies only to appeals challenging quasi-judicial decisions and not to the legislative decisions appealed in *Cosner* and *Hartley*. In LUBA's view, "[a]pplying the waiver doctrine to legislative decisions as well as quasi-judicial decisions seems entirely consistent with the policy of ORS 197.805 that 'time is of the essence in reaching final decisions in matters involving land use.'" *Hatley*, LUBA Nos. 2012-017/-018/-030, slip op. at 10.

LUBA affirmed the county's decision, concluding that the petitioner was precluded from raising issues stated in six assignments of error and denying the petitioner's remaining substantive assignments of error.

■ MOOTNESS

In *Wetherell v. Douglas County*, ___ Or. LUBA ___, LUBA No. 2012-051 (Order Denying Motion to Dismiss, Nov. 8, 2012), LUBA concluded that it could recognize the "capable of repetition yet evading review" exception to the mootness doctrine, even though the Oregon courts have not. Petitioners in *Wetherell* appealed the county's issuance of a temporary use permit to allow a music festival on land zoned for exclusive farm use (EFU). The music festival occurred 8 days after the county approved the permit. By the time petitioners appealed the permit to LUBA and the county moved to dismiss the appeal as moot, the festival had been over for two months.

LUBA acknowledged it has consistently dismissed appeals that are moot—that is, where a decision on the merits will have no practical effect, as was the case here. The petitioners argued LUBA should hear the appeal under the exception to the mootness doctrine for cases that are "capable of repetition yet evading review," citing *Yancy v. Shatzer*, 337 Or. 345, 359-60, 97 P.3d 1161 (2004). LUBA agreed the fact pattern presented here was likely to be repeated, since the festival flyer identified it as "our 2nd annual event" and the property owners are likely to seek permits to hold the festival on future years. Additionally, it is unlikely that the county could act quickly enough on a future festival permit application to allow time for a LUBA appeal to be filed and resolved before the festival actually occurs. Any future appeal might be moot and, as a result, the propriety of county's permit issuance could evade review.

The only question before LUBA was whether it could or should apply the exception to the mootness doctrine as petitioners urged. In *Yancy*, the Oregon Supreme Court held the Oregon Constitution's grant of powers to the judicial branch do not allow Oregon courts to decide a moot case, even if it is capable of repetition and evading review. LUBA concluded that as a part of the executive branch, it is not similarly bound and that it will "continue to recognize and apply the mootness doctrine exception for cases that are capable of repetition yet evading review." *Wetherell*, LUBA No. 2012-051, Order at 6. LUBA denied the county's motion to dismiss and allowed the appeal to proceed.

Kathryn Beaumont
